CHASE MANHATTAN ASIA LTD.

v.

THE OFFICIAL RECEIVER & LIQUIDATOR OF FIRST BANGKOK CITY FINANCE LTD.

COURT OF APPEAL, HONG KONG
LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE
[PRIVY COUNCIL APPEAL NO. 56 OF 1988]
30 APRIL 1990

COMPANY LAW: *Loan agreement - Guarantee - Promissory notes - Assignment - Whether assignment absolute or by way of mortgage - Promissory note not endorsed and delivered - Whether promissory notes held on trust for assignees - Effect of non-compliance with s. 80(1) of the Companies Act.*

In December 1985, PPC ("the borrower") borrowed 10 million Swiss Francs ("the loan") from FBC ("the lenders"). Repayment of the loan was guaranteed by TMB ("the guarantors"). The loan agreement provides that repayment shall be by instalments beginning 1988 and ending 1990, but the borrower issued two promissory notes which provided payment on 30 June 1986.

By an assignment made in April 1986, the lenders assigned part of the loan (Sw.Fr. 5 million) to the appellant CMA ("the assignee"). By Clause 7 of the assignment, the lenders agreed to deliver one promissory note duly endorsed by the lenders to the assignee but this was not done. By Clause 10 of the assignment, the lenders agreed to buy back the assigned loan on 30 June 1986, but the lenders failed to do so.

On 15 September 1986, the lenders were wound up due to insolvency and the official receiver (the respondent) was appointed liquidator. The guarantors repaid the entire loan of Sw.Fr.10 million to the official receiver whereupon the promissory notes were endorsed and delivered to the guarantor. The assignee then claimed payment of part of the sum received by the official receiver from the guarantor. In support of their claim, the assignee argued that on 8 April 1986 the lenders became subject to a specifically enforceable obligation to endorse and deliver the promissory notes to the assignee. Until fulfilment of this obligation, the lenders held the promissory notes in trust for the assignee. The assignee claimed that the official receiver had, in breach of that trust, assigned the promissory notes to the guarantor and must therefore account to the assignee for the sum of 5 million. The official receiver contended that the equitable charge over the promissory notes is void against the official receiver by virtue of s. 80(1) and (2) of the Companies Ordinance (Cap 32).

Held:

[1] The promissory note was a negotiable instrument given by the borrower to secure the payment of a book debt of the lenders but the note was not deposited with the assignee; therefore the assignee cannot claim the protection of s. 80(5).

[2] The assignment did not create a charge on a book debt but only entitled the assignee to possession of the document which constituted the promissory note.

[3] On a true construction of the assignment, the rights of the assignee in the promissory note ceased on 29 June 1986; accordingly, the claim of the assignee to payment by the official receiver is dismissed.

[4] The effect of non-compliance by the lenders (of their duty to endorse and deposit the promissory note to the assignee) was to render the promissory note in their possession charged in equity with the obligation to pay the 5 million to the assignee on 30 June 1986. This effect is fatal to the claim of the assignee since there has been a failure to comply with s. 80(1) and (2) of the Companies Ordinance since particulars of the charge created by the assignment of the promissory note and the loan had not been registered in time.

[Appeal by the assignee dismissed.]

Legislation referred to:
Companies Ordinance (Cap 32) [HK], ss. 80(1), (2), (5)

JUDGMENT

Lord Templeman:

On 31 December 1985 the People Plaza Co. Limited ("the borrower") borrowed 10 million Swiss Francs from the appellant First Bangkok City Finance Limited ("the lenders") on the terms of a loan agreement dated 19 December 1985 as amended by a letter dated 27 December 1985. Repayment of the loan of Sw.Fr.10m. by the borrower by instalments, beginning in 1988 and ending in 1990, was guaranteed by Thai Military Bank Limited ("the guarantor"). Pursuant to the terms of the loan agreement as amended, the borrower issued to the lenders two promissory notes each providing for payment of Sw.Fr.5m. and interest on 30 June 1986, notwithstanding the provision in the loan agreement for repayment by instalments.

By an assignment dated 7 April 1986 the lenders assigned Sw.Fr.5m., part of the loan of Sw.Fr.10m. made by the lenders to the borrower pursuant to the loan agreement, to the appellant Chase Manhattan Asia Limited ("the assignee") in consideration of Sw.Fr.5m. paid by the assignee to the lenders on 8 April 1986. On behalf of the assignee Chadwick submitted that the assignment was absolute; on behalf of the lenders Lightman submitted that the assignment was by way of mortgage. This dispute is however irrelevant. By Clause 7 of the assignment the lenders agreed to deliver one of the promissory notes issued by the borrower duly endorsed by the lenders to the assignee. By Clause 10 the lenders agreed that on 30 June 1986 the lenders would buy back the assigned loan of Sw.Fr.5m. by paying to the assignee the sum of Sw.Fr.5m. The assignee agreed that "upon completion of such buy back the assignee shall re-endorse the note in favour of the lenders and re-deliver the note to the lenders". Thus, it was intended, that the assignee would hold the promissory note endorsed in favour of the assignee as security for the payment by the lenders of Sw.Fr.5m. on 30 June 1986. Payment by the borrower to the assignee of the monies due under the promissory note would have reduced the debt of Sw.Fr.10m. incurred by the borrower to the lenders, whether or not under the terms of the loan agreement the lenders were entitled to such reduction on the date when the promissory note was honoured. Thus, in the hands of the assignee, the promissory note would have been an assignment of Sw.Fr.5m., part of the debt of Sw.Fr.10m., incurred by the borrower to the lenders under the loan agreement. The promissory note and the assigned debt would have been security for payment by the lenders to the assignee of the sum of Sw.Fr.5m. payable by the lenders to the assignee on 30 June 1986 pursuant to Clause 10 of the assignment.

The lenders did not endorse the promissory note or deliver it to the assignee but retained the note. The lenders did not pay to the assignee the sum of Sw.Fr.5m. on 30 June 1986 as required by Clause 10 of the assignment. The promissory note held by the lenders and the

debt of Sw.Fr.10m. owed by the borrower to the lenders were charged in equity with payment to the assignee of the sum of Sw.Fr.5m. owed by the lenders to the assignee pursuant to Clause 10 of the assignment.

On 15 September 1986, the lenders were wound up on the grounds of insolvency, and the official receiver was appointed liquidator. The debt of Sw.Fr.10m., owed by the borrower to the lenders, was paid by the guarantor to the official receiver and the promissory note was endorsed and delivered to the guarantor. The assignee claims to be entitled to be paid by the official receiver Sw.Fr.5m., part of the sum received by the official receiver from the guarantor. The argument is that on 8 April 1986 the lenders became subject to a specifically enforceable obligation to endorse and deliver the promissory note to the assignee. Until fulfilment of this obligation the lenders held the promissory note in trust for the assignee. The official receiver in breach of trust assigned the promissory note to the guarantor in effect for Sw.Fr.5m. and must account to the assignee for that sum. The official receiver contends that the equitable charge of the assignee over the promissory note and Sw.Fr.10m. borrowed by the borrower from the lenders is void against the official receiver.

By s. 80(1) and (2) of the Companies Ordinance (Cap. 32) a charge on book debts of a company "shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge ..." are registered in the manner prescribed by the Ordinance and within a time limit fixed by the Ordinance. Particulars of the charge created by Clauses 7 and 10 of the assignment on the promissory note, and on the loan of Sw.Fr.10m. owed by the borrower to the lenders, were not registered within the time limit. The loan of Sw.Fr.10m. owed by the borrower to the lenders was a book debt of the lenders. Clauses 7 and 10 of the assignment created a charge on that book debt.

Section 80(5) of the Ordinance provides that:

> (5) Where a negotiable instrument has been given to secure the payment of any book debts of a company the deposit of the instrument for the purpose of securing an advance to the company shall not for the purposes of this section be treated as a charge on those book debts.

The promissory note was a negotiable instrument given by the borrower to secure the payment of the book debt of the lenders but the promissory note was not deposited with the assignee and, therefore, the assignee cannot claim the protection of s. 80(5). The Ordinance exempts from registration only the holders of a negotiable instrument and that exemption must have been granted in order that the benefits of, and consequences of, negotiability should not be prejudiced by the insolvency of the company which deposits that instrument.

Mr. Chadwick sought to escape from the provision of s. 80(1) and (2) by drawing a distinction between the right of the assignee to possession of the document which constituted the promissory note and the right to payment under the promissory note. The assignment did not create a charge on a book debt but only entitled the assignee to possession of the document which constituted the promissory note, such a document being of nuisance value in that payment would not be made thereunder unless the promissory note itself were surrendered. The distinction between the charge on the book debt of the lenders, and the charge on the document itself, was to be found in the terms of the assignment to which Mr. Chadwick drew attention. Their Lordships do not consider that any such distinction is sound, whether contained in the assignment or not. Delivery of the document which constituted the promissory note would have been a deposit within s. 80(5). The promissory note was not

however deposited; Clauses 7 and 10 of the assignment created a charge in equity on the promissory note, the monies payable thereunder and the debt of Sw.Fr.10m. which the borrower owed to the lenders and which was a book debt.

The Court of Appeal held that, on the true construction of certain provisions of the assignment which it is unnecessary to set forth, the rights of the assignee in the promissory note ceased in any event on 29 June 1986 and accordingly dismissed the claim of the assignee to payment by the official receiver. If the note had been delivered, the rights of the assignee would have continued after 29 June 1986 because Clauses 7 and 10 created a deposit of the promissory note to secure the buy back provisions whereby the lenders would pay Sw.Fr.5m. to the assignee on 30 June 1986. The effect of non-compliance by the lenders with their duty to endorse and deposit the promissory note was to leave the promissory note in the possession of the lenders charged in equity with the obligation of the lenders to pay Sw.Fr.5m. to the assignee on 30 June 1986. This effect however is fatal to the claims of the assignee by virtue of the Companies Ordinance.

In the result their Lordships will humbly advise Her Majesty that the appeal should be dismissed and the cross-appeal allowed, and that the appellant ought to pay to the respondent its costs in the Courts below. The appellant must also pay to the respondent its costs before their Lordships' Board.

Also found at [1990] 2 CLJ 538